

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MEDLINE DIAMED, LLC,)	CASE NO.
)	
Plaintiffs,)	
)	JUDGE
v.)	
)	
DIAMED USA, LLC, COMMUNITY)	<u>NOTICE OF REMOVAL OF</u>
SURGICAL SUPPLY OF TOMS RIVER,)	<u>CIVIL ACTION</u>
INC., JERROLD FRIED, MICHAEL)	
FRIED, HOWARD FRIED, LINDA)	
LIBASSI, LAURA CRONIN and MELISSA)	
HAITHCOCK,)	
)	
Defendants.)	

TO: UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Pursuant to 28 U.S.C. §§ 1441 and 1446, Defendants Community Surgical Supply of Toms River, Inc. (“CSS”), Jerrold Fried, Michael Fried, Howard Fried, Linda LiBassi, Laura Cronin, and Melissa Haithcock, (collectively, “Defendants”), by and through their counsel, hereby give notice of the removal of this civil action from the Stark County Court of Common Pleas of the State of Ohio to the United States District Court for the Northern District of Ohio, Eastern Division, to this Court on grounds of diversity jurisdiction under 28 U.S.C. § 1332. The following statement is submitted pursuant to 28 U.S.C. § 1446(a):

BACKGROUND

1. On or about January 12, 2011, Medline DiaMed, LLC (“Medline DiaMed”) filed the above-captioned action in Stark County Court of Common Pleas of the State of Ohio (the “Re-Filed Matter”) against Defendants. A true and correct copy of the process and pleadings

served on Defendants to date in the Court of Common Pleas of Stark County, Ohio in the Re-Filed Matter are attached as Exhibit A.

2. Previously, on December 20, 2010, Medline DiaMed filed a nearly identical action against all defendants – except DiaMed USA, LLC – in the Court of Common Pleas for Stark County, Ohio, No. 2010CV04554 (the “Original Matter”). A true and correct copy of the process, pleadings and orders served on Defendants in the Court of Common Pleas of Stark County, Ohio in the Original Matter are attached as Exhibit B.

3. On December 23, 2010, Defendants removed the Original Matter to the United States District Court for the Northern District of Ohio, Eastern Division, No. 5:10-cv-02906-SL. A true and correct copy of the Notice of Removal is attached as Exhibit C.

4. On December 27, 2010, Medline DiaMed filed a Motion to Remand on the basis that Michael Fried is an Ohio resident – when he is actually a resident of New Jersey – but the Motion was denied by Judge Sara Lioi on December 29, 2010. A true and correct copy of Judge Lioi’s Order is attached as Exhibit D.

5. On January 12, 2011, the same day the Re-Filed Action was filed, Medline DiaMed dismissed the Original Action. A true and correct copy of the Notice of Dismissal is attached as Exhibit E.

AMOUNT IN CONTROVERSY

6. In the Complaint, Plaintiff seeks “compensatory damages in excess of \$25,000.00” as well as treble and punitive damages. *See* Ex. A, Compl. at 34. Additionally, in the Complaint, Plaintiff alleges that it expects its damages to exceed \$1.7 million. *See id.* at ¶ 8. Defendants therefore believe in good faith that the amount in controversy in this case meets and exceeds the \$75,000 limit required for diversity jurisdiction.

DIVERSITY OF CITIZENSHIP EXISTS – FRAUDULENT (IMPROPER) JOINDER

7. Plaintiff's cause of action is a civil action of which this Court has original jurisdiction under the provisions of 28 U.S.C § 1332(a)(1). Specifically, complete diversity of citizenship exists, as Plaintiff is an Illinois limited liability company with its principal place of business in Ohio while none of properly joined Defendants are residents of either Illinois or Ohio. Specifically, the individual defendants, Linda LiBassi, Laura Cronin, Melissa Haithcock, Jerrold Fried, Michael Fried, and Howard Fried, are all citizens of the state of New Jersey. Community Surgical Supply of Toms River, Inc. is a New Jersey Corporation with its principal place of business in New Jersey.

8. Defendant DiaMed USA, LLC ("DiaMed USA") was not a defendant in the Original Action and has been fraudulently and improperly joined in the Re-Filed Action in an attempt to defeat diversity jurisdiction.

9. A defendant can establish fraudulent joinder by showing that there is no purpose to prosecute an action against the non-diverse defendant because a court can grant full and complete relief to the plaintiff in its absence. *Rose v. Giamatti*, 721 F. Supp. 906, 914 (S.D. Ohio 1989) (quoting *Brady v. Indemnity Ins. Co. of N. Am.*, 68 F.2d 302, 303 (6th Cir. 1933) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921))).

10. First, Medline DiaMed previously filed a nearly identical action that did not name DiaMed USA as a defendant less than a month ago. *See* Ex. B. At that time, Medline DiaMed was fully aware of all of its potential causes of action and attempted to defeat diversity by alleging that one of the defendants, Michael Fried, was an Ohio resident, while he has actually lived in New Jersey for years. *See* Ex. D. The addition of DiaMed USA is Plaintiff's attempt to overcome the denial of Plaintiff's Motion to Remand in the Original Action.

11. Second, the assets of Defendant DiaMed USA were purchased by Plaintiff Medline DiaMed on October 28, 2010. *See* Ex. A, Compl. at Ex. B. Scott Wakser, listed on the face of the Complaint in this action as the statutory agent for DiaMed USA, is the President of Plaintiff Medline DiaMed and was a part-owner of DiaMed USA, along with CSS. Thus, by adding Defendant DiaMed USA, Plaintiff Medline DiaMed cannot recover anything more than it otherwise would because Defendant DiaMed USA is hardly more than a shell at this point – it is in the process of closing operations and Medline DiaMed already has most of its assets.

12. Third, a court can grant full and complete relief to Plaintiff Medline DiaMed in the absence of Defendant DiaMed USA because the Complaint names CSS, a former part-owner of DiaMed USA. The misrepresentations alleged in the Complaint and attributed to DiaMed USA were allegedly made by Defendants CSS, Michael Fried, Jerrold Fried and Howard Fried. Plaintiff Medline DiaMed presumably is only pursuing the CSS-owned half of DiaMed USA as it has not named the other former part-owners of DiaMed USA, including Scott Wakser. Thus, Plaintiff Medline DiaMed's ability to recover its alleged damages is not impacted by the presence or absence in the matter of DiaMed USA, a company that is in the process of winding down operations and that has few assets left that are not already owned by Medline DiaMed.

PROCEDURAL REQUIREMENTS

13. Defendants received a copy of the Complaint on January 13, 2011. Thus, this notice of removal is being filed within 30 days of Defendants' receipt of the Complaint and within one (1) year of commencement of this action.

14. Because this Court would have had original jurisdiction over the Verified Complaint under 28 U.S.C. § 1332 had it been originally filed in this Court, and because Defendant DiaMed USA has been fraudulently and improperly joined, the case is removable to

this Court pursuant to 28 U.S.C. § 1441(a) and (b). This Court is the United States District Court for the district where the action filed in the Court of Common Pleas is pending.

15. Written notice of the filing of this Notice of Removal will be given to the Plaintiff, and a copy of this Notice of Removal will be filed with the Clerk of the Court of Common Pleas of Stark County, Ohio, as provided by 28 U.S.C. § 1446(d).

CONCLUSION

Based on the foregoing, the properly joined Defendants Community Surgical Supply of Toms River, Inc., Jerrold Fried, Michael Fried, Howard Fried, Linda LiBassi, Laura Cronin, and Melissa Haithcock pray that the above-referenced action now pending in the Stark County Court of Common Pleas of the State of Ohio, be removed therefrom to this Court.

Respectfully submitted,

/s/ Colin R. Jennings
Colin R. Jennings
Squire, Sanders & Dempsey LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
216.479.8420
cjennings@ssd.com
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2011 a copy of the foregoing Notice of Removal of Civil Action To: United States District Court, Northern District of Ohio, Eastern Division, was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Colin R. Jennings
Colin R. Jennings